RECORD AND BRIEFS

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In The
Supreme Court of the United States

TIMOTHY IVORY CARPENTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Sixth Circuit

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BRIEF OF THE CENTER FOR COMPETITIVE POLITICS, CENTER FOR MEDIA JUSTICE, COLOR OF CHANGE, AMERICANS FOR PROSPERITY FOUNDATION, AND TEA PARTY PATRIOTS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Politics is a nonpartisan, nonprofit organization that works to protect and defend the First Amendment rights of speech, assembly, and petition. As part of that mission, the Center represents individuals and civil society organizations, *pro bono*, in cases raising First Amendment objections to burdensome regulation of core political activity.

The Center for Media Justice (CMJ) is a national racial justice network hub taking action for 21st century media and technology rights, access and representation. Founded in 2008, CMJ is home to the Media Action Grassroots Network (MAG-Net) – the largest racial justice network for media, technology and cultural change in the United States. CMJ's mission is to win communication rights and representation for under-represented communities, with dignity and power for all. CMJ mobilizes and supports media justice campaigns, and strengthens the power of racial justice movements to win media rights and representation through network organizing, collective action, and capacity building.

Color Of Change is the nation's largest online racial justice organization and represents over one million members. As a national online force, the organization moves decision-makers in corporations and government to create a more human and less hostile world for Black people in America. By

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or its counsel, financially contribute to preparing or submitting this brief. Both parties have provided written consent to the filing of this brief.

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designing strategies powerful enough to fight racism and injustice—in politics and culture, in the work place and the economy, in criminal justice and community life, and wherever they exist—it is changing both the written and unwritten rules of society. Color Of Change mobilizes its members to end practices and systems that unfairly hold Black people back, and champion solutions that move us all forward.

Americans for Prosperity Foundation ("AFPF" or "the Foundation") is a 501(c)(3) nonprofit dedicated to promoting limited government and free markets. Because of the controversy surrounding its views, the Foundation and its known associates have repeatedly been subjected to vile, credible threats and even violent attacks. In an attempt to decrease these chilling effects, the Foundation actively protects its donors' and associates' confidentiality despite frequent governmental and media efforts to unmask them. Consistent with its mission of limited government, AFPF seeks to ensure the sanctity of the Bill of Rights, including preserving Fourth Amendment protections against unlawful government searches and seizures as well as safeguarding associational and expressive freedoms under the First Amendment, especially in the face of governmental overreach.

Tea Party Patriots represents over 3 million supporters and donors and over 800 locally affiliated groups. Many of these supporters meet with their local groups in quarterly, monthly, or weekly meetings where they discuss the issues we face as a nation, debate the merits of various solutions, and organize to spur action on the solutions we support. The organization and many of its affiliates also use

rallies as a tactic for spurring action by government officials. The organization believes in a country that protects personal and economic freedoms. It believes the freedom to associate is vital for its continued effectiveness. The group and many of its local affiliates were targeted by the IRS for their political beliefs, which greatly harmed their ability to operate. It is concerned that some government officials would use cell site location information to intimidate supporters or potential supporters from attending these meetings and rallies.

Amici have an interest in this case because the government's unhindered ability to collect and use cell site location data threatens to chill the First Amendment right to freedom of association.

SUMMARY OF THE ARGUMENT

Wireless service providers track all Americans carrying cellular phones—that is, virtually all of us. That information can pinpoint a person's location with great precision, and private companies store this data for years. In the future, this capability will expand, and the resulting information will potentially be stored in perpetuity.

While this case concerns the location of a single individual, that is not the only way in which locational data may be used. In a world where tracking information is so precise that individual rooms can be differentiated, the locations of multiple people can be amalgamated, allowing the government to assemble an extraordinarily precise picture of citizens' memberships, meetings, and associations.

Consequently, the government's warrantless access to this information threatens Americans' First

Amendment right "to pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP v. Ala.*, 357 U.S. 449, 466 (1958). After all, associational liberty needs "breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963), and must be "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

The warrantless collection of geolocational data from third parties risks short-circuiting these precedents and undermining the right to private association. This information offers governments the ability to reverse-engineer not merely groups' membership lists, but to also identify people with sympathy for or a passing interest in an organization's aims. Left unchecked, this power will discourage Americans from engaging in public gatherings and private meetings of all types, chilling both social and political association and the collective speech it fosters.

In recent Terms, this Court has not permitted the government to obtain a person's location or contacts on demand. That trend should continue, not only in the interest of the Fourth Amendment, but also to protect the First Amendment right to free and private association.

ARGUMENT

I. Cell site location data allows the government to pinpoint an individual's associations with extraordinary precision.

Virtually all Americans go about their day carrying a tracker in their pocket or purse. *Riley v. Calif.*, 134 S. Ct. 2473, 2490 (2014) ("According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time..."). A cell phone's "[h]istoric location information...can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." *Riley*, 134 S. Ct. at 2490. Allowing the government to freely access this data poses significant First Amendment concerns that necessitate the protections of a warrant requirement.

As Justice Sotomayor recognized in the context of warrantless GPS tracking, location data "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring). In fact, cell site location data will soon be even more precise than the information collected in *Jones*. It will be able to show which meeting room at a community center a person visited, or what establishment in a strip mall she patronized. Pet. 7 ("Location precision is also increasing as service providers deploy millions of 'small cells,' 'which cover a very specific area, such as one floor of a building,

the waiting room of an office, or a single home'") (quoting *United States v. Graham*, 824 F.3d 421, 448 (4th Cir. 2016) (*en banc*) (Wynn, J., dissenting in part and concurring in the judgment); Pet. 8 ("The prosecutor argued to the jury, for example, that Mr. Carpenter was 'right where the first robbery was at the exact time of the robbery, the exact sector'").

And while it would be difficult for the government to install GPS devices under practically all private motor vehicles in the United States, allowing unwarranted access to cell site location data gives the government the same reach, combined with the ability to search through years of past data. Electronic Frontier Found. *Amicus* Br. in Supp. of Cert. 5 (noting "estimated 378 million...mobile device accounts in the United States"); *id.* at 10 ("Cell providers store this date for up to five years and can also track CSLI [Cell Site Location Information] in near real-time") (brackets supplied). There is every reason to believe that the precision of cell site location data, as well as the length of time for which it can be stored, will only increase in years to come. *Id.* at 10-11 (describing recent "advances" increasing reliability and specificity of cell site location information).

Carte blanche governmental access to this information raises significant First Amendment concerns. Because this data can be amalgamated—as happened here, where records for a number of people were simultaneously collected—requests for cellular location data can provide an extraordinarily precise picture of citizens' memberships, meetings, and associations. Such access is dangerous: "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is

undeniably enhanced by group association." *NAACP*, 357 U.S. at 460. The government's ability to call up a person's geolocation history at will unquestionably functions to chill those gatherings, a result that both violates the First Amendment and poses a substantial threat to a vibrant civil society.[2]

II. In addition to the Fourth Amendment concerns raised in the Petition, the government's ability to obtain archived, granular location data for the bulk of the American population poses a grave risk to First Amendment associational liberties.

The right of all Americans "to pursue their lawful private interests privately and to associate freely with others in so doing," *NAACP*, 357 U.S. at 466, is a "basic constitutional protection[]," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973), that "'lies at the foundation of a free society.'" *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (*per curiam*) (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)). Consequently, this Court has long protected the right not only to associate, but to do so privately, free from government surveillance or interference.

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[2] *See* Edmund Burke, *Reflections on the Revolution in France*, 41 (J.G.A. Pocock, ed., Hackett Publishing Co. 1987) ("...to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country, and to mankind").

a. Freedom of association is protected by the First Amendment.

This Court first explicitly enumerated the contours of this "basic constitutional protection" in a series of decisions in the 1950's and 1960's. Those cases stemmed from the efforts of segregationist Southern governments to obtain the membership lists of civil rights organizations through corporate registration laws (*NAACP v. Alabama*), legislative investigations (*Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963)), and the taxing power (*Bates v. City of Little Rock*, 361 U.S. 516 (1960)).

These precedents established that associational liberty cannot be abridged for naught, and that government action potentially infringing on free association will be "subject to the closest scrutiny." *NAACP*, 357 U.S. at 461. Governments must tread carefully when condoning or conducting activities that touch upon that protected freedom, even in contexts less dire than those faced by the NAACP. *E.g. Kusper*, 414 U.S. at 57 (holding, where a citizen was prevented from voting in a different party's primary less than 23 months after casting her last vote, that "unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments").[3]

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[3] Indeed, this Court has relied upon *NAACP v. Alabama* to facially rewrite campaign finance disclosure laws, reasoning that overly expansive disclosure demands "can seriously infringe on privacy of association and belief guaranteed by the First Amendment" *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (*per curiam*).

Whenever a "State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971). Such "sweeping state inquiries into these protected areas...discourage citizens from exercising rights protected by the Constitution." *Baird*, 401 U.S. at 6. Even when the government claims that its activities are backed by interests of the highest order, associational liberty may nevertheless trump. *See Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 802 (2d Cir. 2015) (relying on *NAACP v. Alabama* to permit, in national security context, First Amendment claim against government metadata collection because of the Plaintiff's "members' interests in keeping their associations and contacts private").

Accordingly, freedom of association is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *City of Little Rock*, 361 U.S. at 523.[4] "The strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs" belongs to "all legitimate organizations." *Gibson*, 372 U.S. at 555-556, and "it is immaterial whether the beliefs sought to be advanced

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[4] As the *NAACP* Court noted, "recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although *in neither case* was there an effort to suppress speech." 357 U.S. at 461 (emphasis supplied) (citing *United States v. Rumely*, 345 U.S. 41, 46-47 (1953) and *United States v. Harriss*, 347 U.S. 612, 625-626 (1954)).

by association pertain to political, economic, religious[,] or cultural matters." *NAACP*, 357 U.S. at 462.

The *NAACP* and *Buckley* cases protect not merely controversial political dissent, *e.g. Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), but also more prosaic groups. For instance, the Eleventh Circuit has ruled that a city violated the First Amendment when it sought to "require[] corporate applicants for adult business licenses to disclose the names of 'principal stockholders'" privately to a regulatory agency, and invalidated the ordinance when the agency was unable to demonstrate a sufficient need for that information. *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358, 1366 (11th Cir. 1999) (citation omitted).[5]

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[5] That associational liberty is granted such a wide berth is unsurprising. This Court has repeatedly stated that "First Amendment freedoms need breathing space to survive." *Button*, 371 U.S. at 433; *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 468-469 (2007) (Roberts, C.J., controlling op.) (quoting same); *In re Primus*, 436 U.S. 412, 432 (1978) (quoting same); *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (quoting same); *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 604 (1967) (quoting same); *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) ("'Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected'") (quoting *Bond v. Floyd*, 385 U.S. 116, 136 (1966)). This Court reaffirmed this principle just this Term in the free exercise context. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) ("The Missouri Department of Natural Resources has not subjected anyone to chains or torture on account of religion. And the result of the State's policy is nothing so dramatic as the denial of political office...").

b. The government's ability to review citizens' every movement is likely to chill this constitutionally protected right.

If a state government tried to obtain the membership list of the Council on American-Islamic Relations, the Becket Fund, the American Civil Liberties Union, Planned Parenthood, the Heritage Foundation, Black Lives Matter, or some other issue group, whether through foreign corporation statutes, the taxing power, or other means, it would be rebuffed by courts following established precedent. *See Calif. Bankers Ass'n v. Shultz*, 416 U.S. 21, 98 (1974) (Marshall, J., dissenting) ("The First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong or contribute to the organization, absent a compelling governmental interest requiring disclosure"); *NAACP*, 357 U.S. at 462 ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs").

But permitting governments to obtain the geolocational data of individuals that attend political meetings and events provides an opportunity to short-circuit these cornerstone precedents and reverse-engineer not only the membership list of a targeted group, but also identify those with sympathy for or a passing interest in the organization. A single group meeting, for instance, can be documented and archived. *See* Electronic Frontier Found. *Amicus* Br. in Supp. of Cert. 10-11.

In the instant matter, the government obtained 127 days of location history, and such data is stored

by private companies for up to five years. Going forward, we must assume that as the capacity to collect and archive this data grows, it will soon be possible for geolocational data to be held more-or-less permanently.

In such circumstances, declining to engage in public gatherings and private meetings may well become a rational choice for a broad range of opinion holders, including those who may presently exist within the mainstream of political thought. Today's majority opinion, after all, can rapidly become tomorrow's minority view. Associated Press, "Mozilla CEO resignation raises free-speech issues", USA Today, Apr. 4, 2014 (recounting controversy surrounding the resignation of Brendan Eich as CEO of Mozilla after his political donations in support of a successful California constitutional amendment became public knowledge).[6]

Such outcomes are precisely what this Court has sought to prevent. Chilling effects from this invasive form of government oversight will do grave damage to the First Amendment, which was designed to safeguard our "profound national commitment to the principle that debate on public issues should be uninhibited..." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Mills v. Ala.*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs").

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[6] *Available at:* https://www.usatoday.com/story/news/nation/2014/04/04/mozilla-ceo-resignation-free-speech/7328759/.

III. Requiring the government to obtain a warrant before viewing, analyzing, or acting upon geolocational data will safeguard freedom of association.

In recent Terms, this Court has limited the government's ability to determine a person's location or contacts on demand. *United States v. Jones*, 565 U.S. 400 (2012) (installing GPS device on car constitutes a search under the Fourth Amendment); *Riley v. Calif.*, 134 S. Ct. 2473 (2014) (Fourth Amendment requires that police obtain a warrant before searching data, including geolocational data, stored on a smartphone); *United States v. Karo*, 468 U.S. 705, 714 (1984) (warrantless "monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment..."). Had these cases been decided differently, more than the Fourth Amendment would have been affected. These rules would have directly impacted the ability of all Americans to associate with whomever they choose, free of government interference or surveillance, in their efforts to "advance[]...political, economic, religious[,] or cultural matters." *NAACP*, 357 U.S at 466. In this case, as in those, procedural protections are vital.

NAACP v. Alabama, once again, is instructive. Because a judicial forum was available, the NAACP was able to challenge the State of Alabama's subpoena of its membership list. *See Buckley*, 424 U.S. at 25 ("[G]overnmental 'action which may have the effect of curtailing the freedom to associate'" must be "'subject to the closest scrutiny'") (quoting *NAACP*, 357 U.S. at 460-461). Had the State of Alabama been able to simply obtain that information from a third

party, this important judicial check would have been unavailable, and the "likelihood of a substantial restraint" upon NAACP members' "right to freedom of association" would have been far higher. 357 U.S. at 462. Only a robust judicial backstop prevented that outcome.

CONCLUSION

The rights protected by the First Amendment function as an interlocking mechanism that protects our polity as a whole. Here, requiring the government to obtain a warrant before obtaining geolocational data will do more than vindicate the Fourth Amendment rights already explained by the Petitioner. That limitation will also guard against the "significant encroachments on First Amendment rights of the sort that compelled disclosure" of private information "imposes." *Buckley*, 424 U.S. at 64.

Respectfully submitted,

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